UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union International, Local 1192, AFL-CIO, CLC,

Respondent,

and

Jimmie Ray Williams, **Case No. 12-CB-109654**

Charging Party,

and

Buckeye Florida Corporation, a Subsidiary of Buckeye Technologies, Inc., and Georgia Pacific, LLC.

Employer.

Amicus Brief of International Union, Security, Police, and Fire Professionals of America (SPFPA)

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INTRODUCTION

On March 24, 2014, Administrative Law Judge William Nelson Cates issued a decision finding that the Respondent violated Section 8(b)(1)(A) of the Act through the implementation of a "Fair Share Policy." The Respondent has asked the Board to adopt a rule "allowing unions to charge non-members a fee for grievance processing, so long as that fee does not exceed the amount a union could charge non-member objectors under ***Beck*** and ***California Saw.***" The Board has invited the filing of briefs to address the following questions:

1. Should the Board reconsider its rule that, in the absence of a valid union-security clause, a union may not charge non-members a fee for processing grievances? Should it adhere to or overrule *Machinists, Local No. 697 (H.O. Canfield Rubber Co.)*, 223 NLRB 832 (1976), and its progeny?

2. If such fees were held lawful in principle, what factors should the Board consider to determine whether the amount of such a fee violates Section 8(b)(1)(A)? What actions could a union lawfully take to ensure payment?

International Union, Security, Police, and Fire Professionals of America ("SPFPA" or "Union") writes in support of the Respondent's position that the Board should overrule ***Machinists, Local No. 697.*** Further, the Board should adopt a rule allowing unions to charge nonmembers for grievance processing and arbitration costs.

STATEMENT OF INTEREST

The International SPFPA and its Local Unions represent security professionals across the Country working at various federal buildings, nuclear facilities, public and private universities, detention centers, major manufacturers, businesses, entertainment venues and more. The majority of these employees are members of the Union and pay dues, but there are employees who have exercised Beck rights, and pay fees related to representation costs. As more States adopt "Right to Work" laws, an increasing number of employees choose to forego any payments to the Union. The

duty of fair representation, of course, requires the Union to represent all employees regardless of their status as members or non-members, whether they pay dues or service fees or not. Due to the nature of the security industry, the Local Unions of the SPFPA typically represent smaller bargaining units, especially in comparison to industrial unions. As such, the effects of the Right to Work laws are demonstrably more harmful.

The International Union, SPFPA writes in support of a new rule, permitting unions to charge free riders a fee for the processing of grievances. Permitting unions to charge non-payors for grievance representation would not be a condition of employment, nor would it be coercive of employee rights. The new rule could limit the fee only to the percentage of member dues related to grievance processing, and could be capped at the full amount of arbitration costs.

ARGUMENT

A. The Board Should Overrule "Machinists" and Allow Unions to Charge Non-Members a Grievance Processing Fee.

Current Board policy largely arose from ***Machinists, Local No. 697*** *(H.O Canfield Rubber Co.),* 223 NLRB 832 (1976). In that case, the union informed a member that it "would not arbitrate non-member grievances unless the employee paid the costs." The Board stated that Section 8(b)(1)(A) of the Act makes it "an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act." Those Section 7 rights can be exercised through "representatives of their own choosing, to engage in other concerted activities for their mutual aid or protection, and to refrain from the above." The Board reasoned that since the union did "not condition the processing of grievances by dues-paying members on their paying costs" the union had "drawn a distinction between members and nonmembers," and thus engaged in unlawful discrimination. *Id.*

The Board continued that by a unions "selection as bargaining representative it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially" meaning that a union must "act as a genuine representative of all the employees in the bargaining unit" regardless of their status as member or non-member. Once a union becomes the exclusive bargaining representative of employees, it receives the protection of the Act, and in "exchange for the protection of the act, the bargaining unit must represent all unit employees." *Id.* Further, the "grievance and arbitration procedure is a primary tool in the implementation of the collective bargaining agreement" meant to protect employee rights "already secured by contract." *Id.*

Machinists largely rested on the issue of discrimination, as the Board had "repeatedly held that, although a union is permitted wide discretion in its handling of grievances, a union cannot lawfully refuse to process a grievance of an employee in the unit because he is a nonmember." *Id.* The union in ***Machinists*** was not refusing to process the grievance, but refusing to process the grievance unless the employee paid the associated costs. The union argued that charging costs was "reasonable and necessary to protect the dues paid by its members from being eroded by expenditures to protect nonmembers." *Id.* Ultimately, the Board held that charging non-members for grievance processing amounted to discrimination, and reasoned that "a grievance procedure is vital to collective bargaining and that grievance representation is due employees as a matter of right. To discriminate against nonmembers by charging them for what is due them by right restrains them in the exercise of their statutory rights." *Id.*

The holding in ***Machinists*** is archaic, and rests on the false presumption that if unions are permitted to charge nonmembers a fee, employees will be restrained or coerced in exercising their right to not join the union. ***Machinists*** relied heavily on Board precedent established in ***Hughes***

Tool Company, 104 NLRB 318 (1953), in which a union announced it would charge $15 for grievance processing and $400 for arbitration cases. The Board in ***Hughes*** stated that by "adopting such a procedure, [the union] has, in effect, taken the position that it will only represent its members in the important area of contract administration." ***Hughes***, at 329. However, the goal of the Union is not to exclude non-members from the grievance process, but to protect the interests, and funds, of those who actually financially contribute. Non-members are not required to join the union, but merely pay their fair share for the union's time and effort. In effect, Right to Work laws act as discrimination against unions, as employees are able to reap all the benefits of the union contract without contributing to the cause. This hampers union strength and financial viability, and discourages union membership. Dues payors often rebel against supporting free riders.

A Board policy requiring non-members to pay representation costs would not intrude on Section 14(b), nor would the payment of such costs be a condition of employment. The employee could decline representation and waive any claim that the duty of fair representation has been breached. In no other industry or setting are individuals entitled to *pro bono* legal services simply as a "matter of right." The Board has asserted that by charging non-members, a union "abuse[s] the privileged status it occupies as certified representative by using that status as a license to grant or deny representation according to its own arbitrary standards." ***Hughes*** at 328. However, the duty of fair representation already requires that a union represent all employees regardless of membership. A union cannot deny access to the grievance process based on membership, and any arbitrary method of preventing non-members access would surely lead to an unfair labor practice charge.

Requiring non-members to pay the reasonable costs of representation on their behalf does not involve philosophical concerns or differences. An employee, as with the ***Weingarten*** right,

could decline union representation. It is unreasonable to expect that a non-dues paying member receive the same representation benefits as dues payors. There is, however, an expectation among free riders that the union will come to their rescue when needed, and under the current state of law, the union is obligated to do so. Whether non-membership is based on philosophical or economic considerations, the affected employee has no problem making immediate contact with the union and demanding representation.

Moreover, it is not discrimination to require some form of payment for representation. The non-member is not being asked to join the union or pay for anything aside from the costs directly associated with their personal grievance and/or arbitration. The non-member is free to represent themselves in lieu of the union. Without the union, the grievance process would not exist; free riders are typically the first to file a grievance and demand arbitration. If the union finds the grievance is not meritorious, free riders are the first to file an unfair labor practice charge. Free riders demand cost free representation, and if it does not meet their expectations, file charges against the union. It is unreasonable that unions be subjected to the whims of non-members that do not pay any form of compensation, and actively detract from the interests and funds of actual members.

B. The Board Should Consider Financial Core Membership as an Outline

The Board's decision in ***Beck*** illustrates the logic of separating representation and non-representation costs of a union. A dues paying member has the option under union security of resigning from membership and selecting a service fee that is limited to costs of representation related to hours, wages, and other terms and conditions of employment. While ***Beck*** deals with union security in a non-"Right to Work" State, it is precedent for sharing representation costs throughout the unit by members and non-members alike.

As wages have been frozen or stagnant, union dues/service fee income has diminished, albeit costs have increased. The majority of SPFPA arbitration cases are discipline and discharge. As a matter of practice and policy, the International Union provides legal representation through the arbitration without costs to the local union. Individual grievants are, of course, treated equally irrespective of membership. Costs for discharge cases include the arbitrator's fee and expenses, court reporter, witness fees, attorney fees and expenses, and miscellaneous costs. It is patently unfair and unreasonable that free riders can expect, indeed demand, that the union provide pro bono representation. However, ***Beck*** establishes a viable alternative that allows an individual to remain a non-member, while still permitting a union to receive some form of compensation for its time and effort. This also protects the financial interest of full members.

In ***Communications Workers of America v. Beck***, 487 U.S. 735 (1988) the Supreme Court recognized that the duty of fair representation requires that it provide its members with the option to pay only that portion of union dues attributable to "collective bargaining, contract administration, and grievance adjustment" *Id.* at 745. Such a fee is not considered discriminatory or coercive of employees. This in turn provides guidance for a potential new rule. A non-member would of course only be charged upon request for representation. The only costs the non-member would pay would be directly related to the grievance processing services provided by the union, including potential legal representation through union counsel. Non-members would not be required to pay to gain access to the grievance process, only for the union's services.

The free rider service fee should be in an amount equal to the union's reasonable costs for processing and arbitrating a grievance that benefits the non-fee payor. Such costs are easily ascertainable and would be itemized. The affected employee would have the option of declining union services and the union would have no further obligations to the employee.

The employee could pay the costs in advance or execute a wage assignment and pay a ***Beck*** service fee until the grievance/arbitration costs are paid in full. The ***Beck*** option would be exercised at the outset of the grievance procedure, and if in default, the union could withdraw from the procedure. In the event of an unpaid balance for any reason, the union could bring a civil action to collect a debt.

A free rider would not be relieved of a service fee obligation by resignation, retirement or termination of employment.

The proposed service fee would be limited to actual service on a particular grievance and would cease when the grievance was withdrawn, settled or decided by an arbitrator. The union would continue to have broad discretion to process and resolve the grievance. The individual employee has an option throughout to sever the service arrangement and it has nothing to do with union membership and it is not a condition of employment.

CONCLUSION

The Board should overrule ***Machinists*** and establish a new rule permitting unions to charge free riders a fee for grievance processing. In doing so, the Board should apply ***Beck*** rights and financial core service fees as a guiding principle. The rule change will bring only limited relief to unions which are presently required to provide full representation to non-payors. Free riders will continue to enjoy the fruits of collective bargaining and negotiated wages and benefits. They would only be charged for personal service and benefits that they elect to receive. Such a policy is long overdue and does not contradict Section 14(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2015, I efiled the foregoing Amicus Brief on the Executive Secretary of the National Labor Relations Board, and served copies by electronic mail on the following:

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